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FILED
MAR 3 0 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-1158

In the Supreme Court of the United States

RODGER STROUP, Director, South Carolina Department of Archives and History; STATE OF SOUTH CAROLINA, ex rel Henry McMaster, Attorney General for the State of South Carolina ,

Petitioners,

v.

THOMAS LAW WILLCOX, JOHN M. WILLCOX and KATHRYN WILLCOX PATTERSON,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. *ERIE* IS A JURISDICTIONAL RULE AND THE COURT OF APPEALS VIOLATED THAT DECISION

The State of South Carolina (State)[1] asserts that the failure of the Court of Appeals to apply State law under *Erie RR. v. Tompkins*, 304 U.S. 64 (1938) was, itself, a jurisdictional failure.[2] As stated in *Markham*, *supra*, note 2, "*Erie* requires that the federal court grant or withhold relief as the state courts would." 292 F. 2d at 718. *Erie* imposed such restrictions as limitations on the Article III power of the Federal Courts as discussed in the Petition herein. (*See* Petition p. 9, n. 7).

Numerous decisions recognize *Erie* as a limit on the power of federal courts. "*Erie* . . .expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." (emphasis added). *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981); *see also*, *US v. Little Lake Misere Land Co.*, 412 U.S. 580,591 (1973) ("This principle follows from *Erie* itself where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts

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[1] All references herein to State include Petitioner Rodger Stroup as well as the State of South Carolina.

[2] The State did not argue the unrelated issue that *Erie* should be applied to the determination of jurisdictional issues which appears to be the point addressed by *Markham v. City of Newport News*, 292 F. 2d 711, 717 (4th Cirt. 1961), which Willcox cites.

did not possess the power to develop a concomitant body of general federal law."); *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304, 334 (1981)[3]; *Twist v. Prairie Oil and Gas Co.*, 274 U.S 684, 691 (1927).[4]

Such lack of Article III power is a limitation on the power of the Federal Courts, and therefore, is a jurisdictional issue that can be raised at any time. See, Petition, p. 9, n. 7. The Court of Appeals exceeded its power by applying general law rather than State law and in doing so, transgressed its jurisdictional limits. Such an issue can be raised now, but it was also subsumed in the State's earlier arguments regarding the application of State law and certification.

Willcox fails to demonstrate that the Court of Appeals complied with *Erie*. Ironically, Willcox attempts to defend the decision of the Court of Appeals on the merits using primarily decisions from North Carolina,[5] Massachusetts[6], and a federal

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[3] " *Erie* made clear that federal courts, as courts of limited jurisdiction, lack general power to formulate and impose their own rules of decision." *City of Milwaukee*, *supra*, (Marshall, dissenting)

[4] "Such waiver is possible, because the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court as a federal court, but to the merits." *Twist* , *supra*

[5] *North Carolina v. West*, 235 S.E. 2d 150 (N.C. 1977).

[6] *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), Involved only private individuals, one of whom had a copyright to certain of George Washington`s papers. The interest of the federal government in those papers was not adjudicated. The Court concluded the case on the basis of the copyright.

court[7]. This reliance on the authority of other jurisdictions underscores the *Erie* violation in this case and the failure of the Court of Appeals to apply South Carolina law.[8]

Willcox erroneously contends that the Bankruptcy Court relied on a *North Carolina v. West, supra,* "framework of analysis." That case was certainly not the principal authority on which the Bankruptcy Court based its decision. Petition, p. a70. That Court relied primarily on South Carolina authority and discussed *West* only as to the point that the State cannot be

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[7] *Nixon v. United States*, 978 F. 2d 1269 (D.C. Cir, 1992) addressed the question of the ownership of Presidential papers. This decision was based upon three factors not present in the instant case, the absence of a common law rule, a "robust tradition" of private ownership, and explicit legislative recognition. Willcox' arguments about the retention of records of other Governors, which is oddly placed in his *Erie* argument, is addressed *infra* in Argument II.

[8] Willcox does discuss South Carolina law regarding presumption of ownership from possession, but that authority does not address the ultimate question of whether the Documents at issue are public property under State law.

Willcox also addresses the State Records Act that was passed long after the Documents in question were created. S.C. Code Ann. §30-1-10, *et seq.* (1991 and Supp. 2006). The State did not argue in its Petition that the Act directly applies to the Documents in question, but the State did emphasize that the Act represented a codification of existing South Carolina policy. That Act clearly applies to the Governor's papers because they are ". . . prepared, owned, used in the possession of or retained by a public body. . . ." §§30-1-10(A) & 30-4-20 (c) (Supp. 2005).

divested of its property absent legislation.[9] *West* was mentioned in the State's District Court brief only in response to Willcox' arguments about the case and was mentioned only late in the State's Court of Appeals briefs as to the divestiture argument.

The one South Carolina case that Willcox discusses was not one on which the State or the Bankruptcy Court relied. *Sternberger v. McSween*, 14 S.C. 35 (1880). Willcox completely misreads *Sternberger* to assert that " . . . the state Supreme Court intimates that mere possession can ripen into ownership, even of a government record." *Sternberger* recognized that records on file are public records. That case did not hold that a removed record is non-public, but simply noted rhetorically that public records would lose their character if they were removable at will. The case did not hold that public records were removable. Rather than support Willcox's position, *Sternberger* supports the State.

In connection with the *Erie* argument, Appellant fails to discuss any of the South Carolina case law and statutes[10] on

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[9] Willcox cites *Ops. Atty. Gen* (July 23, 1965), 1965 W.L. 11245, (J.A. p. 183) which held that State agencies lack authority to make a gift to another state of historic records pertaining to that state absent legislative authorization. Archives witness McCawley testified that the reason that South Carolina had a copy of Georgia charter referenced in the 1965 Opinion was that the text of the document had been recorded in a South Carolina record book. J.A. p. 453, l. 9 - p. 454, l. 18. It was, therefore, a South Carolina, not a Georgia document.

[10] As noted *supra*, note 7, Willcox makes factual arguments about the disposition of the records of former Governors which conflict with the Bankruptcy Court's findings and are discussed infra in Argument II. These factual arguments have nothing to do with the *Erie* violation in this case.

which the Bankruptcy Court relied as to the key issue of whether the Documents in question are public records. Willcox relies on authority from other jurisdiction just as that Court did. In doing so, Willcox demonstrates the *Erie* violation in this case rather than overcomes it.

II. THE COURT OF APPEALS DETERMINATION OF SOUTH CAROLINA STATE LAW ISSUES IS PLAINLY WRONG

A. Fact Findings

Willcox argues that the Court of Appeals did not depart from the Fact findings of the Bankruptcy Court, but it clearly did so. Contrary to his assertions, the State has identified several key departures from the Bankruptcy Court's findings by the Court of Appeals. In particular, although the Court of Appeals recognized that the Documents were produced in an official context (Petition, p. a14, n. 2), its decision conflicted with the Bankruptcy Court's findings as to docketing. The Bankruptcy Court specifically found that the " . . . docketing system [for the Documents] appears to indicate an intent to preserve the document as relating to the public office." Petition, p. a61." This finding was more than a finding of the production of the Documents in an official context. It was a finding as to the intent of the State regarding the disposition of the Document. Moreover, the Court of Appeals ignored the following overriding finding of the Bankruptcy Court: "In sum, the Documents as a whole appear to relate to the official duties of the public office of the Governor and for the reasons stated herein appear to be public records." 329 B.R. at 568 (App.

a62). [11]

Although Willcox's argument concerning the disposition of the papers of some South Carolina Governors has no bearing on his *Erie* argument, he placed it in that section of his brief and gave brief mention to it in connection with his argument as to the plainly wrong Court of Appeals decision. His argument that Governors papers are considered private, and the related findings of the Court of Appeals directly conflicts with the following finding of the Bankruptcy Court: ". . .[I]t appears that the State has been active in preservation of its records. . . . Plaintiff did not present convincing evidence to support its conclusion that Governor's records involving public functions are considered private and that they are generally kept by each Governor to do with what they wish." [footnote omitted]. 329 B.R. at 572 (Petition, p. a69). Moreover, most of the documents of former Governors that are at other institutions are accessible to the public as noted in the Petition.[12]

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[11] The Court of Appeals also failed to follow this finding of the Bankruptcy Court: "The fact that many of the official duties of the Governor, a public official, are specifically addressed by the referenced Documents, lends strong support to the State's position that the Documents are public records. [footnote omitted]." 329 B.R. 567 (App. a59). *See* also *infra*, as to the the records of other Governors.

[12] Willcox references a December 9, 1959 letter from the Attorney General's Office regarding records of 1940's Governors. Westlaw database at 1959 WL 10669. J.A. p. 328, l. 18 - p 330, l. 5. Archives actually has the records of the Governors of South Carolina during the period 1942 to 1945 referenced in the 1959 letter. J.A. p. 455, l. 9 - p. 456, l. 16. The Opinion made clear that Archives, at that time, had not been able to check all of its files for the documents due to its preparation for a move. *Id.* Obviously, those records were later found.

Willcox's Brief , including his Statement of the Case, contains a number of factual errors and speculation about the history of the Documents. These errors include speculation about how General Law might have acquired and passed on the Documents,[13] the family's care for the Documents and Law's attempts to sell or otherwise dispose of the Documents, [14]

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[13] The Court of Appeals found "t]here is no evidence of how General Law acquired the papers." Petition, p. a10. Willcox's statement that the State's witnesses admitted that General Law might have been given the Documents by legislative Act or the Governor's express direction are unsupported by the references he makes to the Record. The Bankruptcy Court found that the purpose of moving large numbers of State records out of Columbia was "presumably to prevent their destruction." Petition, p. a44. Contrary to assertions in Willcox's Brief, the Bankruptcy Court found that a large number of State archives and records were stored in location in Chester and elsewhere. Petition, p. a44.

Willcox contends that the Documents in question were given to his Great Aunt and passed from her to his father. These contentions are speculative and appear to be unsupported by the Record. *See*, Petition, p. a10.

[14] Willcox contends that his family has preserved, protected and organized the documents for approximately 140 years. This statement is inaccurate. As Willcox recognizes, he found the Documents in a bag in his deceased stepmother's closet after her home had been cleared of other property.

His speculation that General Law's sale of the Documents was in accordance with expectations of "the participants" in historic events, also conflicts with the statement of General Law's granddaughter Annie Storm over eighty years later that the Documents were entrusted to him for safekeeping and should be returned to South Carolina. J.A. pp. 764, 767, 770, 771, 784 and 785.

correspondence of General Laws' granddaughter[15] and irrelevant discussion of certain matters regarding the restraining order issued as to the auction of the Documents in 2004.[16] Willcox contends that "General Law acted at all times as the rightful and lawful owner of the papers," but this statement conflicts with the Court of Appeals' recognition that "[t]here is no evidence of how General Law acquired the papers" and that the papers "surfaced" only one time during General Law's apparent possession of them. Petition, p. a10.

B. Cases and Statutes

Willcox only briefly mentions *State v. Farnum*, 73 S.C. 165, 53 S.E. 83,85 (1905) and other State cases and statutes that are determinative in this case and very clearly support the Bankruptcy Court's determination that the Documents are public records and the property of the State of South Carolina.

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[15] Willcox' refers to Dr. Meriwether, whom Ms. Storm wrote, as a representative of the State of South Carolina, but the Bankruptcy Court found that the communications did not place on notice the Historical Commission, the predecessor to the Department of Archives, and the agency with the responsibility to collect historical documents. 329 B.R. at 574-575. (App. a75-a76). Therefore, Mr. Meriwether was not a representative of the State as to the matters in question.

[16] Willcox also references conversations with Petitioner Stroup at the time of the auction, but does not note Dr. Stroup's recollection that, because his staff was looking at the Documents at that time, he ". . . [did not] know if we have a claim for these documents." J.A. p. 572, ll. 1-5.; *see also* p. 527, l. 22 - p. 529, l. 241. The statements of the effect of the injunction on Willcox' privacy do not appear to be supported by the Record. Moreover, these issues are not relevant to the issue of the ownership of the Documents.

That authority is discussed at length in the State's Petition. pp. 20- 25. The Fourth Circuit's failure to apply that State authority or its reading it exceedingly narrowly was plainly wrong and nullified State law contrary to the authority of this Court. *Leavitt v. United States*, 518 U.S. 137, 144 (1996).

III. THE FAILURE TO CERTIFY STATE LAW QUESTIONS TO THE STATE SUPREME COURT CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEALS

Willcox's brief discussion of this issue primarily focuses on what he contends was a failure to preserve the issue. As discussed in the State's Petition, the State preserved the certification issue at every stage of the proceedings.

Willcox contends that no conflict in the circuits exists on certification because the Fourth Circuit Court of Appeals made no decision regarding the issue. The State raised the issue of certification in its brief and in its petition for rehearing. Although the Court of Appeals did not write about the issue, it did make a decision not to certify. While the State recognizes that a Court has discretion as to whether to certify (*Lehman Bros. v. Schein*, 416 U.S. 386, 391(1974)), the Supreme Court has vacated decisions of Courts of Appeals so that certification could be considered. *Lehman Bros.*; *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (2002). In failing to certify, the Court of Appeals departed from basic principles of federalism and the precedent of other Circuits and the United States Supreme Court. "The final arbiter of state law is the state supreme court" (*Blue Cross Blue Shield of Alabama v. Nielsen*, 116 F3d 1406, 1412 (11th Cir. 1997), but the Fourth Circuit made itself the final arbiter of State law in this case and wrongly decided and nullified State law in the process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted to review the Opinion of the Court of Appeals.

Respectfully submitted,

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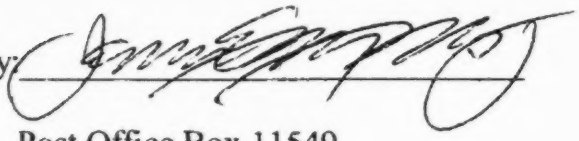
By: 

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March 29, 2007